

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ENCORE SERIES Inc. d/b/a THE PHILLY POPS	:	
	:	
Plaintiff	:	
v.	:	CIVIL ACTION NO. 2:23-cv-01421
	:	
THE PHILADELPHIA ORCHESTRA and THE PHILADELPHIA ORCHESTRA AND KIMMEL CENTER, INC.	:	
	:	
	:	
	:	
Defendants	:	

**PLAINTIFF’S ANSWER AND AFFIRMATIVE DEFENSES
TO DEFENDANTS’ COUNTERCLAIMS**

Plaintiff, Encore Series, Inc. d/b/a the Philly POPS Answers the Counterclaims to its Amended Complaint as follows:

1. Paragraphs 1, 2, 6, 7, 9, 22, 23, 24, 45, 46, 47, 60, 61, 62, 63, 64, 69, 70, 76, 77, 78, 79, 80-87, 89, 90, 91, 93-100, 104, 105, 106-113, 115-121, 126-129, 131, 142, 143, 165, 167, 169, 173, 178, 179 are ADMITTED.

2. Paragraphs 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 56, 57, 58, 65, 66, 67, 68, 71, 72, 73, 74, 75, 88, 92, 95, 101, 102, 103, 114, 116, 117, 122, 125, 130, 132, 133, 134, 135, 136, 139, 140, 141, 144-164, 174-177, 180-196 (as to falsity, untruthfulness and financial harm or injury) are DENIED.

3. Paragraphs 29, 137, 138, 139 are DENIED as Plaintiff is without sufficient knowledge or information to form a belief as to the truthfulness of said averments.

4. Paragraphs 3, 4, 5, 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 46, 47, 48, 49, 50-56, 59, 65, 109, 198-205, 207-213, 215-219, 221-224, 226-232, and 234-241 of Defendants’

counterclaims are conclusions of law to which no response is required. To the extent that these allegations are deemed to contain factual statements, they are DENIED.

AFFIRMATIVE DEFENSES

1. KCI and Ticket Philadelphia are not indispensable parties to the Antitrust and Common Law Claims asserted in the Plaintiff's Amended Complaint.

2. The counterclaims asserted by the Purported Counterclaim Plaintiffs are not substantially related to the claims by the Philly POPS in the Amended Complaint under the provisions of Fed. R. Civ. P. 18 and/or 19.

3. This Court Should Decline to exercise Supplemental Jurisdiction over the State Law Counterclaims asserted by all Counterclaim Plaintiffs.

4. Some or all of the contractual claims under various contractual provisions or amendments asserted by the Purported Counterclaim Plaintiffs are precluded by the applicable Statutes of Limitations.

5. The payment terms of Licensing agreements between KCI, Ticket Philadelphia and POKC were modified by the course of conduct by the parties and/or oral or subsequent written modifications allowing the Philly POPS to pay for rental obligations in accordance with its cash flow before, during and after the COVID Pandemic.

6. The Contractual and quasi contractual claims by KCI, POKC and Ticket Philadelphia are precluded by principals of waiver and estoppel.

7. The Contractual and quasi contractual claims by KCI, POKC and Ticket Philadelphia are precluded by the doctrine of unclean hands.

8. The Counterclaim Defendants' claims are barred, in whole or in part, for the failure to state a claim upon relief can be granted.

9. The Philly POPS is entitled to set-off and/or recoupment.

10. The Philly POPS was not in default of its payment obligations to POKC or KCI as modified by subsequent written or oral agreement of the parties.

11. POKC's Defamation and Commercial Disparagement claims are precluded by the defenses of truthfulness, lack of actual malice and that they were made in the course of and for the purposes of litigation by between the parties.

12. POKC is equitably precluded from justifying its eviction from Verizon Hall during the 2022-23 Concert Season as said eviction violated the federal antitrust laws as alleged in the Amended Complaint.

13. The Philly POPS, refusal to pay in advance for services performed by Ticket Philadelphia was justified by Ticket Philadelphia's breach of its agreement to produce and issue tickets for 2022 – 2023 concerts at Verizon Hall beginning in mid-2022.

WHEREFORE, Plaintiff respectfully submits Defendants' counterclaims be dismissed.

RESPECTFULLY SUBMITTED:

/s/ William A. DeStefano

William A. DeStefano

Terri A. Pawelski

SAXTON & STUMP

123 South Broad Street, 28th Floor

Philadelphia, PA 19102

*Counsel for Encore Series, Inc. d/b/a The Philly
POPS*

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of July, 2023, a true and correct copy of the foregoing Answer and Affirmative Defensed to Defendants' Counterclaims was served on the following counsel for Defendants by means electronic mail and the Eastern District of Pennsylvania's ECF filing and service system.

Steven A. Reed, Esquire
Morgan Lewis & Bockius
1701 Market Street
Philadelphia, PA 19102

/s/William A. DeStefano

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